



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

23 CFR Part 636

[FHWA Docket No. FHWA-2013-0043]

RIN 2125-AF58

Design-Build Contracting

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FHWA is revising its regulations related to the use of alternative technical concepts (ATC) in design-build project delivery of highway construction. This final rule eliminates the requirement to submit a base proposal when a contracting agency allows design-build proposers to submit ATCs in their technical and price proposals.

DATES: Effective [Insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For technical information: Mr. Gerald Yakowenko, FHWA Office of Program Administration, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, 202-366-1562, gerald.yakowenko@dot.gov. For legal information: Ms. Janet Myers, Office of the Chief Counsel, 202-366-2019, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

This document and all comments received may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. The Web site is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page, <http://www.federalregister.gov>, or the Government Printing Office's Federal Digital System, <http://www.gpo.gov/fdsys>.

Background

The FHWA's current regulatory policy in part 636 allows contracting agencies to use ATCs in their procurement process subject to two conditions: 1) the ATC must not conflict with the criteria agreed upon in the environmental decisionmaking process, and 2) the contracting agency must require proposers to submit a base proposal in addition to supplemental ATC-based proposals. Specifically, 23 CFR 636.209(b) states: "At your discretion, you may allow proposers to submit alternate technical concepts in their proposals as long as these alternate concepts do not conflict with criteria agreed upon in the environmental decision making process. Alternate technical concept proposals may supplement, but not substitute for base proposals that respond to the Request for Proposal requirements."

Thus, the current policy allows proposers to submit proposals based on an approved ATC, but not as a substitute for the base proposal.

The requirement for a base proposal and a supplemental ATC-based proposal was founded on the perception that it would allow for a fair comparison of proposals. When

FHWA released the final rule implementing design-build contracting on December 10, 2002, the Agency believed that the requirement would provide contracting agencies with information on quality and price for comparison. In addition, contracting agencies could evaluate ATC-based proposals from firms desiring to submit innovative concepts. The underlying principle in the existing policy is to ensure fairness and open competition by making certain that all proposers are competing for the same project.

Notice of Proposed Rulemaking (NPRM)

The FHWA published an NPRM on August 1, 2013 (78 FR 46546), proposing to eliminate the base proposal requirement when a contracting agency allows design-build proposers to submit ATCs in their technical and price proposals. All comments received in response to the NPRM have been considered in adopting this final rule. Comments were received from 10 entities. The commenters include: four State departments of transportation (State DOTs), one local public agency, and five industry associations.

Analysis of NPRM Comments and FHWA Response

The following discussion summarizes the major comments submitted to the docket on the NPRM, notes where and why changes have been made to the rule, and states why particular recommendations or suggestions have not been incorporated into the final rule.

General discussion of comments

In general, most of the commenters expressed support for the revisions and concurred that a fair and transparent procurement process can be achieved as long as the request for proposal (RFP) document clearly describes the contracting agency's requirements for ATC content, submission, and review; procedures for confidential

meeting; and methods for evaluating the ATC in the proposal review process. None of the commenters disagreed with ending the base proposal requirement when a contracting agency allows design-build proposers to submit ATCs in the technical and price proposals. However, a few commenters raised issues concerning confidentiality and the implementation of design-build contracting.

Several of the contracting agencies noted the benefits of using ATCs in design-build project delivery and concurred that the requirement to prepare base proposals is not cost effective. In particular, the Orange County Transportation Authority (OCTA) noted that “ATCs have been proven to provide numerous benefits including the increased efficiency, the reduction of project risks, and the acceleration of project delivery. Requiring proposers to prepare and submit multiple proposals requires the expenditure of additional funds and man hours that discourages proposers from developing ATCs. OCTA believes that by removing this requirement, design-build proposers will instead be encouraged to explore and develop ATCs and include them in their design-build proposals.”

Comments on the confidentiality requirement

Several commenters expressed differing viewpoints regarding confidentiality issues in the ATC submission and review process. While the Design-Build Institute of America (DBIA) agreed with the proposed deletion of the base submission requirement, they expressed concerns regarding the exception to confidentiality in proposed section 636.209(b)(2). Specifically, DBIA stated that “confidentiality is essential to the success of the ATC process and there should not be any exceptions to maintaining that confidentiality. DBIA believes that breaking confidentiality impedes design-builders

from distinguishing the benefits of their ATC proposal from other proposals. Not only does breaking confidentiality discourage design-builders from submitting ATCs; it may have the opposite effect. In the example given in the proposed rule, a design-builder concerned about an addendum may choose to not bring forth an alternative to avoid a 4(f) property. The owner never learns of this and the 4(f) is not avoided, thus depriving the owner of the benefits of ATCs.” Similarly, the American Road and Transportation Builders Association believed that contracting agencies have two primary responsibilities in administering an ATC process: “1. Any willingness or acknowledgement for changing the project scope of work or requirements first set out in the RFP must be conveyed to all design-build teams so that no single team attains an unfair advantage. 2. Strict confidentiality must be maintained relative to intellectual property and ideas presented by each design-build team during the ATC process.”

On the other hand, two of the contracting agencies agreed with the proposed language regarding confidentiality. The Washington State DOT noted that confidentiality is “essential for encouraging use of ATCs,” but “there are circumstances under which the agency would be compelled, in the interest of fairness, to reveal certain basic configuration changes to other proposers as a result of the inquiries associated with or consequent to a proposed ATC.” In addition, New York DOT commented that experience “with a proposed ATC avoiding 4(f) impacts and right-of-way acquisition” demonstrated the need for the exceptions to the confidentiality requirement.

The FHWA shares the DBIA’s belief that confidentiality is important, but also agrees with the contracting agency representatives regarding the necessity for the exception to confidentiality. It is important that contracting agencies provide a

transparent and level playing field for all proposers. When a contracting agency makes a determination that there is no feasible and prudent alternative that avoids the use of Section 4(f) property, that agency is making a statement regarding the basic configuration for the project. If it later becomes apparent that there is a prudent and feasible approach to avoid the taking of Section 4(f) property, then, in the interest of fairness, it is incumbent upon the contracting agency to amend the RFP basic configuration/design criteria and inform all proposers of a modification. The FHWA revised the language in the final rule to indicate that when disclosure is necessary, the contracting agency must revise the RFP documents by releasing the minimal amount of information necessary to:

- (1) ensure compliance with Federal or State permitting and other legal requirements; and
- (2) ensure that all proposers are aware of the revised RFP requirements.

Comments on an “equal or better” requirement

The Washington State DOT was concerned that the proposed regulatory language did not include an “equal or better” provision that is present in many State DOT ATC contract provisions. The Washington State DOT believed that this omission might “open the door to scope reductions disguised as ATCs and upset the ‘level playing field’ concept that FHWA has worked so hard to establish and maintain.” The FHWA shares the State’s concern that this omission might result in undesirable scope reductions. The “Background” section of the August 1, 2013, NPRM noted that ATCs are based on the concept of “equal or better” solutions. However, the FHWA is reluctant to provide a regulatory definition for an ATC. Many State DOTs currently have their own definitions in contract language. Instead of defining ATC, we are including the “equal or better” requirement in the revised 23 CFR 636.209(b)(1).

Comments on evaluation factors

The Council on Federal Procurement of Architectural and Engineering Services (COFPAES) did not comment directly on the proposed revision to Section 636.209, but provided a general comment on FHWA's design-build policy in part 636. The COFPAES urged that two-phase design-build contracts under 23 U.S.C. 112(b)(3) and 41 U.S.C. 3309 should comply with the requirements of the Brooks Act (40 U.S.C. 1101, et seq.) such that in phase one of a design-build process, "cost related or price-related evaluation factors are not permitted." The FHWA notes that COFPAES submitted a similar comment in response to the FHWA's October 19, 2001, NPRM for design-build contracting (66 FR 53288). In the preamble to the December 10, 2002, final rule implementing design-build contracting (67 FR 75902), the FHWA stated: "Design-build contracts are not contracts strictly for the procurement of architectural or engineering services and, therefore, they are not subject to the requirement to use qualifications-based selection procedures. In many design-build contracts, the engineering or architectural services comprise a relatively small percent of the total contract amount. The FHWA recognizes the importance of architectural and engineering services in reducing the life-cycle cost of projects. However, design-build contracts are not architectural and engineering contracts and the provisions of 23 U.S.C. 112(b)(2) do not apply to design-build contracts."

Additional Changes from the Proposed Rule

The FHWA is substituting the term "alternative technical concept," in the final rule, for "alternate technical concept," in the proposed rule, because the word "alternative" is more appropriate for the ATC process used by many contracting agencies

where proposers are allowed to submit multiple technical concepts for the same project. Although there are some instances of the use of the word “alternate,” most contracting agencies use “alternative” in their ATC process. Therefore, the FHWA is using “alternative” in the final rule.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT

Regulatory Policies and Procedures

The FHWA has determined that this action will not be a significant regulatory action within the meaning of Executive Order 12866, or within the meaning of DOT’s regulatory policies and procedures.

The economic impact of this rulemaking will be minimal and not adversely affect, in a material way, any sector of the economy. This rulemaking merely revises the FHWA’s policies concerning the design-build contracting technique. The rule will not affect the total Federal funding available to the State DOTs under the Federal-aid highway program. Therefore, an increased use of design-build delivery method will not yield significant economic impacts to the Federal-aid highway program. Additionally, this rule will not interfere with any action taken or planned by another agency and not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601- 612), FHWA has evaluated the effects of this action and has determined that the action will not

have a significant economic impact on a substantial number of small entities. The rule provides procedures for use of ATCs in design-build project delivery of highway construction. As such, it primarily affects States, which are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, States do not meet the definition of a small entity and the RFA does not apply. The FHWA further certifies that the proposed action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (UMRA). Section 202 of the UMRA (2 U.S.C. 1531-1538) requires Federal agencies to prepare a written assessment of proposed Federal mandates likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year. This rule will not result in the expenditure by State, local, or tribal governments, or by the private sector, of more than \$100 million annually.

Executive Order 13132 (Federalism)

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. The FHWA has analyzed this action in accordance with the principles and criteria contained in Executive Order 13132 and determined that it will not have a substantial direct effect or sufficient federalism implications on the States. The FHWA

has also determined that this action will not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. The FHWA did not receive any comments on the intergovernmental review analysis.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.), the FHWA must obtain approval from the Office of Management and Budget for each collection of information we conduct, sponsor, or require through regulations. The FHWA has determined that this rule does not contain a collection of information requirement for purposes of the PRA.

National Environmental Policy Act

The FHWA has analyzed this rule for the purpose of the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 et seq.), and determined that it will not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20). However, Federal-aid highway projects on which design-build is used must still comply with the NEPA, as amended.

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this rule under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. This rule will

not affect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA has analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this rule will not cause an environmental risk to health or safety that might disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this rule under Executive Order 13175 and believes that it will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal laws. This rule addresses obligations of Federal funds to States for Federal-aid highway projects and will not impose any direct compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this action under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. The FHWA has determined that this rule is not a significant energy action because it is not a significant regulatory action under Executive Order 12866 and is not likely to have

a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Executive Order 12898 (Environmental Justice)

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The FHWA has determined that this rule does not raise any environmental justice issues.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 636

Construction, Construction manager, General contractor, Grant programs, Transportation, Highways, and Roads.

Issued on: January 31, 2014

Gregory G. Nadeau
Deputy Administrator

Federal Highway Administration

In consideration of the foregoing, FHWA amends title 23, Code of Federal Regulations, part 636 as follows:

PART 636--DESIGN-BUILD CONTRACTING

1. The authority citation for part 636 continues to read as follows:

Authority: Sec. 1503 of Pub. L. 109-59, 119 Stat. 1144; Sec. 1307 of Pub. L. 105-178, 112 Stat. 107; 23 U.S.C. 101, 109, 112, 113, 114, 115, 119, 128, and 315; 49 CFR 1.48(b).

2. Amend § 636.209 by revising paragraph (b) to read as follows:

§ 636.209 What items must be included in a phase-two solicitation?

* * * * *

(b) (1) At your discretion, you may allow proposers to submit alternative technical concepts (ATCs) in their proposals if:

(i) The ATCs:

(A) Provide an equal or better solution; and

(B) Do not conflict with criteria agreed upon in the environmental decisionmaking process; and

(ii) The RFP document clearly describes your:

(A) Requirements for ATC content, submission, and review;

(B) Procedures for confidential meetings (if used); and

(C) Methods for evaluating ATCs in the proposal review process.

(2) You must maintain the confidentiality of ATCs, except to the extent that disclosure is necessary to maintain compliance with Federal or State permitting and other

legal requirements necessary for the delivery of the project. When disclosure is necessary, you must revise the RFP documents by releasing the minimal amount of information necessary to ensure:

- (i) Compliance with Federal or State permitting and other legal requirements; and
- (ii) All proposers are aware of the revised RFP requirements.

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